INDEX

	Page
CITATION TO OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
I. Facts	3
II. When and How the Federal Question Was Raised and Decided Below	6
REASONS FOR GRANTING THE WRIT	9
I. The Court Should Review This Case to Resolve Circuit Conflicts and Disputes Among State Appellate Courts Concerning the Availability of Fourth and Fifth Amendment Protections to Bar the Admission Into Evidence of Private Notes, Writings, and Communications, Testimonial in Nature, Taken From the Private Possession and Control of an Accused Pursuant to the Compulsion of a Search Warrant	9
CONCLUSION	21

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:

United States Constitution
Amendment IV ..... *passim*
Amendment V ..... *passim*
Amendment XIV 3

Page

STATUTES:

S. C. Code, Art. 3.4, § 32-1510.51 (Cum. Supp. 1973) .. 3, 4
U. S. Code, Title 28, § 1257 2

CASES:

Bellis v. United States, 409 U.S. 330 (1974) 19, 20
Boyd v. United States, 116 U.S. 616 (1886) .....*passim*
Clark v. United States, 269 A.2d 59 (Del. 1970) 17
Couch v. United States, 409 U.S. 322 (1969) 6, 19, 20
Gilbert v. California, 388 U.S. 266-67 (1967) 14, 15
Gouled v. United States, 255 U.S. 298 (1921) .....*passim*
Hill v. Philpott, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) .....*passim*
Hoffman v. United States, 341 U.S. 479, 486 (1951) 5
Schmerber v. California, 348 U.S. 761 (1965) 13, 14, 15
Shapiro v. United States, 335 U.S. 1 (1948) 17
State v. Bisaccia, 45 N.J. 504, 213 A.2d 185 (1965) 17
State v. Lawrence, — S.C. —, — S.E. 2d — (Dec. 10, 1974) (Op. No. 19924) 5, 9
United States v. Bennett, 409 F.2d 888 (2d Cir. 1969) 17, 20
United States v. Blank, 459 F.2d 383 (6th Cir.), *cert. denied*, 409 U.S. 887 (1972) 9, 17, 20
United States v. Judson, 63-2 U.S.T.C. 9568 (9th Cir. 1963) 19
Vonder Ahe v. Howland, 71-1 U.S.T.C. 9333 (9th Cir. 1973) 17, 18
Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967) .....*passim*

OTHER AUTHORITIES:

8 J. Wigmore Evidence, § 2264, at 380 (McNaughton Rev. ed. 1961) 14, 15

LIPTON, SEARCH WARRANT IN TAX FRAUD INVESTIGATIONS, 56 A.B.A.J. 941, 943 (1970) 18

WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL, § 665, n. 88 (1969) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1144

KENNETH G. LAWRENCE, M.D., ELIZABETH REED, and EDWARD REED, *Petitioners,*

v.

STATE OF SOUTH CAROLINA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioners, Kenneth G. Lawrence, M.D., Elizabeth Reed, and Edward Reed respectfully urge this Court to issue a writ of certiorari to review the final judgment of the Supreme Court of South Carolina in the above-captioned case.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of South Carolina, dated December 10, 1974, is set out in the Appendix, *infra,* at 1a. It is not yet officially reported.

The judgment and sentencing by the Court of General Sessions, Florence County, South Carolina, on December 11, 1973, are not embodied in a reported

opinion. The Record excerpts therefrom are set out in the Appendix, *infra*, at 13a.

The Order staying the judgment of the Supreme Court of South Carolina pending disposition of this petition is appended at 12a.

JURISDICTION

The final judgment and opinion of the Supreme Court of South Carolina were filed December 10, 1974 (App. at 1a), and stayed December 23, 1974 (App. at 12a).

No request for rehearing was made.

The certiorari jurisdiction of this Court is invoked under 28 U.S.C. § 1257, in that the judgment below deprived petitioners of rights protected by the Fourth and Fifth Amendments as incorporated against the States by the Fourteenth.

QUESTION PRESENTED FOR REVIEW

Whether the Fourth and Fifth Amendments Bar the Admission Into Evidence of Private Notes, Writings, and Communications, Testimonial in Nature, Taken From the Private Possession and Control of the Accused Pursuant to the Compulsion of a Search Warrant?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION:

AMENDMENT IV—

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

AMENDMENT V—

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."

AMENDMENT XIV—

> " . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

7 S. C. CODE, art. 3.4, p. 296 (Cum. Supp. 1973):

> "§ 32-1510.51. Prohibited Acts C; penalties.—(a) It is unlawful for any person knowingly or intentionally: * * *
>
> "(3) To acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge;
>
> "(4) To furnish false or fraudulent material information in, or omit any material information from, any application, report, or other document required to be kept or filed under this article, or any record required to be kept by this article . . . ."

STATEMENT OF THE CASE

I. Facts

Petitioner Kenneth G. Lawrence, M.D., is an obstetrician-gynecologist, duly licensed and engaged in practice in Florence, South Carolina.

Petitioners Edward Reed and Elizabeth Reed are husband and wife.

Mrs. Reed was an occasional patient of Dr. Lawrence and also worked for him sporadically as a part-time assistant.

On September 19, 1973, armed with a search warrant, Dr. John P. Wood, an inspector for the South Carolina State Board of Health, and others, went to the

offices of petitioner Dr. Lawrence (Tr. p. 86).[1] There they seized certain patient charts from Dr. Lawrence's personal patient files (Tr. p. 86).

Two days later Deputy Sheriff Eddie Tallon returned to Dr. Lawrence's office with a second search warrant (Tr. p. 96). Pursuant to this warrant, Tallon seized from Dr. Lawrence's desk drawers and files a number of notes and memoranda in the handwriting of one or more of the petitioners (Tr. pp. 14-18).

Copies of the papers seized are set out in the Appendix, *infra,* at 14a-30a.

These papers were indisputably in the sole possession and custody of Dr. Lawrence and no one else. They were not business records kept in the ordinary course, but were private memoranda, many on scraps of paper.

After these searches, all three petitioners were indicted, tried, and convicted of conspiracy to violate Act. No. 445 of 1971, amending S. C. Code, art. 3.4, § 32-1510.51(a)(3) and (4), p. 296 (Cum. Supp. 1973).

The statute pertains to controlled substances—amphetamines or diet pills in this instance. The essence of the accusation was that petitioners intentionally conspired to obtain possession of these diet pills by misrepresentation and/or furnished false information in documents such as prescriptions.

The prosecution attempted to show collusion in having Mr. and Mrs. Reed go to the pharmacy to fill prescriptions for amphetamines signed by Dr. Lawrence, but made out to persons who were not patients. Also,

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[1] References are to the printed "Transcript of Record."

the prosecution claimed that the dosages were excessive and that this was evidence of criminal intent and/or activity.

The papers seized by the searches on September 19 and 21, 1973, could be interpreted by a jury as direct, testimonial evidence against these petitioners. Clearly, each item seized was "a link in the chain of evidence." *Hoffman* v. *United States,* 341 U.S. 479, 486 (1951).

The patient charts, for example (App. draft 14a-17a told that certain individuals were claimed as patients and had been prescribed amphetamines at a certain dosage. The prosecution sought to establish each such allegation as fact at the trial. Indeed, the patients, dosages, and amphetamines were the central part of the State's case. The charts and notes alone made a prima facie case with nothing more.

Similarly, the notes contained "linking" statements and information. Names, dosages, and type of controlled substance appear throughout the notes written in the hand of one or more petitioner.

It is incongruous for the State now to characterize the private papers of Dr. Lawrence as having "nothing incriminatory" and involving "no prohibited 'testimonial compulsion.'" *Brief of Respondent,* p. 3, *State* v. *Lawrence, supra.*

Without the papers there would have been no case. That is the precise reason the papers were seized and introduced into evidence. Without the compulsion of a search warrant, the State could not have entered Dr. Lawrence's office to forcibly take his private records. His thoughts on paper are as private as those in his mind.

II. When and How the Federal Question Was Raised and Decided Below

A. *Pretrial Motions:* No. 1—Prior to trial, counsel for Dr. Lawrence moved "to suppress various evidence . . . " (Tr. p. 4) sought to be introduced against him consisting of "his private records . . . ." (Tr. p. 5). This motion was "founded on the protection granted in the Fourth Amendment and the interrelationship with the Fifth Amendment." (Tr. p. 5).

Counsel relied particularly on *Couch* v. *United States,* 409 U.S. 322 (1969), in that the private records had been in the control and possession of Dr. Lawrence himself, not an accountant as in *Couch.* Defense Counsel for the Reeds joined in this motion to suppress. (Tr. p. 7).

The motion was denied on the ground that "you have there a tax case, and here you have a case dealing with controlled substances . . . ." (Tr. p. 10).

No. 2—On October 26, 1973, counsel for defendants again unsuccessfully moved to suppress "the various books, papers, records, writings, charts, memoranda and written communications illegally obtained by investigators of the State . . . from the private office and containers of the Defendant . . . ." (Tr. p. 13). The motion relied upon "the constitutional privilege against testimonial and self-incrimination under the Fifth Amendment . . . [and] the Fourth Amendment[s] . . . ." (Tr. pp. 13, 14).

No. 3—On a third occasion, November, 1973, with supplemental affidavits, defense counsel orally renewed the motion to suppress, contending that the papers were "within the protection of the Fifth Amendment and of the Fourth Amendment." (Tr. p. 43).

Once more the motion was denied without elaboration. (Tr. p. 44).[2]

B. *Motions During Trial:* At the trial, the prosecution called Dr. John P. Wood, inspector for the State Board of Health, as a witness to introduce notes, writings, and charts taken during one of the searches. (Tr. p. 84). Defense counsel again renewed the motions to suppress. (Tr. pp. 84-85).

Again, the trial court stated: " . . . I am convinced that the warrant was a proper warrant, based on probable cause . . . ." (Tr. p. 85).

The documents were admitted over objection as States' Exhibits 18-25 inclusive. (Tr. p. 86).

The prosecution also called Eddie Tallon, Deputy Sheriff, to introduce other notes and writings taken during the searches. (Tr. p. 95). Again, defense counsel objected, but the documents were admitted as States' Exhibits 27-36 inclusive. (Tr. p. 96).

C. *Motions After Verdict:* The jury returned a verdict of guilty as to each of the petitioners. (Tr. p. 225). Defense counsel for the Reeds then moved for judgment n.o.v., or in the alternative for a new trial, citing as error the trial court's "fail[ure] to suppress those items of documentary material obtained from the offices of the co-defendant Kenneth G. Lawrence alleged to have been written by, or to contain information relating to" (Tr. p. 227) the Reeds.

The motion was summarily denied.

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[2] "THE COURT: Well, I deny the motion. Is there anything further?

"MR. BAKER: Your Honor, on behalf of the defendant Reed, we join in the same motion.

"THE COURT: Motion denied." (Tr. p. 44).

D. *Exceptions:* Defendants' first and fourteenth exceptions preserved the question presented here as follows—

> "1. The Court erred in denying defendants' motion to suppress the illegally obtained evidence seized by search warrant on September 21st, 1973, in that these were personal and private writings and memoranda of the defendants Kenneth G. Lawrence and Elizabeth Reed, immune from search and seizure under the interrelated operation of the Fourth and Fifth Amendments of the U.S. Constitution." (Tr. p. 236).
>
> "14. The Court erred in denying the defendants' motion during the trial to have the Court hear its motion to suppress the evidence consisting of Dr. Lawrence's personal papers seized under search warrant from his private files, desk, and offices." (Tr. p. 238).

E. *Appeal to South Carolina Supreme Court:* On appeal these petitioners presented Question 1 as follows—

> "Question 1 (Exception 1)
>
> "Did the Court err in refusing to suppress the evidence seized under the September 21, 1973, search warrant in that the materials seized were immune from seizure because they were 'testimonial' and 'communicative' private writings and materials protected by the interrelated operations of the Fourth and Fifth Amendments of the U. S. Constitution?' " [*Appellants' Brief,* p. 1, *State* v. *Lawrence,* — S.C. —, — S.E.2d — (Dec. 10, 1974) (Op. No. 19924) (App. *infra,* at 1a)].

The South Carolina Supreme Court, expressly ruling as to *both* search warrants, found "no merit in the appellants' Fourth and Fifth Amendment claims."

State v. *Lawrence, supra.* That Court recognized the conflict of circuits. It declined to follow the Seventh Circuit decision in *Hill* v. *Philpott,* 445 F.2d 144 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971), and instead embraced the views of the Sixth Circuit in *United States* v. *Blank,* 459 F.2d 383 (6th Cir.), *cert. denied,* 409 U.S. 887 (1972).

REASONS FOR GRANTING THE WRIT

I.

The Court Should Review This Case To Resolve Circuit Conflicts and Disputes Among State Appellate Courts Concerning the Availability of Fourth and Fifth Amendment Protections To Bar the Admission Into Evidence of Private Notes, Writings, and Communications, Testimonial in Nature, Taken from the Private Possession and Control of an Accused Pursuant to the Compulsion of a Search Warrant.

The interrelated operation of the Fourth and Fifth Amendments, as each pertains to an individual's right to refuse the production of his personal books and private writings, is not a new problem to this Court. *Boyd* v. *United States,* 116 U.S. 616 (1886), was the first Fourth Amendment case of real consequence and remains to this day a landmark of constitutional interpretation.

The *Boyd* case involved a quasi-criminal forfeiture proceeding for allegedly fraudulent importation of foreign goods. The trial court directed Boyd, in accordance with a federal statute, to produce a private writing relating to the transaction. Boyd thus produced the writings under compulsion as the statute prescribed that in the event of failure to comply, the government's allegations were to be regarded as admitted. The Court viewed such compulsory produc-

tion of private papers as equivalent to a search and seizure (116 U.S. at 622) and phrased the principal Question Presented as follows:

> "Is a search and seizure or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him . . . an '*unreasonable* search and seizure' within the meaning of the Fourth Amendment? 116 U.S. at 622 (Emphasis in original).

To resolve the issue presented the Court engaged in lengthy analysis of the intended application of the Fourth Amendment. Emphasis was placed on the historical controversies predating and contemporaneous with the founding of our Constitution in reaching the following conclusion:

> "[A]ny compulsory discovery by extorting the parties oath, or compelling the production of his private books and papers, to convict him of a crime . . . is contrary to the principles of a free government. . . . It is abhorrent to the instincts of an American. It may suit the purposes of a despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." 116 U.S. at 631.

The Court elaborated upon the underlying privacy rationale of the opinion:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . They apply to all invasions, on the part of the Government and its employees, of the *sanctity of a man's home and the privacies of life.* It is not the breaking of his doors and rummaging of his drawers that constitutes the essence of the offense; *but it is the invasion of his indefeas-*

> *ible right of personal security, personal liberty and private property. . . .*
>
> [A]ny forcible and compulsory extortion of a man's own testimony *or his private papers* to be used as evidence to convict him . . . *is within the condemnation of . . . the Fourth and Fifth Amendments. . . .* 116 U.S. at 630 (Emphasis added).

In noting the interaction of the Fourth and Fifth Amendments and the basic privacy rationale, the Court stated:

> "We have already noticed the intimate relation between the two Amendments. . . . For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man in 'a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. *And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.*" 116 U.S. at 633 (Emphasis added).

The *Boyd* case involved a court order issued for the production of private papers, and not strictly a search and seizure. The reasoning of *Boyd* and the wealth of supportive legal and historical precedent discussed therein was relied upon by the Court in a later case, *Gouled* v. *United States,* 255 U.S. 298 (1921). *Gouled* did involve a search made pursuant to a warrant and the unlawful seizure of private papers. Upon the

authority of *Boyd*, and noting that in actual practice the result is identical to an accused whether he is obligated to supply private papers himself by subpoena or whether such evidence is obtained by search of his premises and resultant seizure, "in either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself" 255 U.S. at 306.

In the course of their Fourth Amendment analysis, the Court in *Gouled* drew a distinction between the seizure of "mere evidence" as opposed to the seizure of "instrumentalities of a crime." This distinction was essential because, under the then prevailing theory, the government's right to seize evidence was dependent upon the property interest each could assert as to the evidence sought to be seized. If the property was the fruit of a crime, *e.g.*, stolen goods, or the instrumentality of a crime, the property right in these items was forfeited to the State as contraband.

In *Gouled*, the Court held that the papers seized were not "instrumentalities of a crime," which would have permitted their seizure. Rather, the papers were viewed to be private, and therefore privileged, written memoranada and as "mere evidence" their seizure was in violation of the Fourth Amendment and their admission would be in violation of the Fifth Amendment.

The reasoning underlying *Gouled* concerning the Fourth Amendment was thoroughly reconsidered in *Warden, Maryland Penitentiary* v. *Hayden*, 387 U.S. 294 (1967). The "mere evidence" theory was overruled as was the premise that property interests control the right of the Government to search and seize. The Court expressly recognized the principal object of

the Fourth Amendment to be the protection of privacy rather than property. The Court substituted for the "mere evidence—instrumentalities" analysis, a "privacy" standard intended to balance the Citizen's right of Fourth Amendment privacy with the Government's interest in solving crime 387 U.S. at 306.

Further, the Court in *Warden* adopted a second emphasis which is characterized as the "testimonial" or "communicative" exception to the Fifth Amendment. Significantly, the *Warden* Court immediately distinguished the nature of the evidence seized in that case from the private writings seized in *Boyd* and *Gouled:*

> "The items of clothing involved in this case [*Warden*] are not "testimonial" or "communicative" in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber* v. *California,* 384 U.S. 757. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure. 387 U.S. at 302-03.

The scope of this exception was subjected to minimal elaboration in *Schmerber,* 384 U.S. at 763-64:

> "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers." (Citing *Boyd*).

In *Schmerber* v. *California,* 384 U.S. 757, 761 (1965) (citing *Boyd* with approval), petitioner was hospitalized following an automobile accident. A police officer

smelled liquor on petitioner's breath and noticing other symptoms of drunkeness, placed him under arrest. After informing petitioner of his rights, the officer directed the physician to take a blood sample despite petitioner's refusal, on advice of counsel, to consent thereto. A report of the chemical analysis of the blood, which indicated intoxication, was admitted into evidence over objection. On appeal, the Supreme Court upheld the admission of the evidence but said:

> "It could not be denied that in requiring petitioner to submit to the withdrawal and chemical analysis of his blood that State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. *The officer's direction to the physician to administer the test over petitioner's objection constituted compulsion for the purposes of the privilege* (384 U.S. at 621). See *Gilbert* v. *California*, 388 U.S. 266-67 (1967) (holding that the taking of handwriting exemplars is a form of compulsion within the meaning of the Fifth Amendment, but that, 'A mere handwriting exemplar, in *contrast to the content of what is written*, like the voice or body itself, is an identifying physical characteristic outside its protection because it is not the kind of 'communication' covered by the privilege) (Emphasis added).

The Court in *Schmerber* held that there was "compulsion" involved in the taking of the blood sample. Schmerber was in no way forced to make "assurance, compelled as an incident of the process, that the articles produced are the ones demanded." 8 J. WIGMORE, EVIDENCE, § 2264, at 380 (McNaughton rev. ed. 1961). Further, the nature of the blood sample taken was such

that "the proof of [its] authenticity, or other circumstances affecting [it], may be and must be made by the testimony of other persons, without any employment of the accused's oath or testimonial responsibility." WIGMORE § 2264. However, the *Schmerber* Court, as noted above, expressly held that the taking of the blood sample over defendant's objection was "compulsion" within the meaning of the Fifth Amendment.[3]

In the present case, as in *Schmerber* and *Gilbert,* petitioners were "passive agents" to these searches through no choice of their own. They objected to the searches of the office, specifically claiming their constitutional rights, including their Fifth Amendment privilege. Thus, the search warrants employed in this instance were coercive tools, and it is totally unrealistic to say that they did not involve "compulsion."

The testimonial-communicative exception has not been the subject of further elaboration since *Warden.* Its scope has, however, been the subject of far differing interpretations by federal circuit courts. (discussed *infra*).

The Question Presented in this Petition [on the inadmissibility of private writings] was resolved favoring exclusion in *Boyd* and *Gouled.* The reasoning of these opinions and the historical analysis upon which they were premised falls into three clearly defined categories:

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[3] This analysis was adopted by the Ninth Circuit in *VonderAhe* v. *Howland,* 73-1 U.S.T.C. 9333 (9th Cir. 1973), a post-*Warden* decision involving seizure of private writings reflecting a taxpayer's personal thoughts and conclusions. The Ninth Circuit suppressed the seized writings as being violatory of the privilege against compulsory self-incrimination under the Fifth Amendment.

First, the traditional right of the citizen to be secure in the privacy of privileged writings, the product of one's own most intimate mental processes. This aspect of the reasoning of the earlier opinions was *not* expressly rejected by the Court in *Warden*. The adoption by the *Warden* Court of the "privacy standard" and "testimonial-communicative" exception evidences support for the conclusion reached in *Boyd* and *Gouled* of the inadmissible nature of private writings.

Second, that the writing was "mere evidence" in which the government had no property interest. It was solely this reasoning adopted by the Court in *Gouled* which was rejected by the Court in *Warden*.

Third, a subpoena and a search warrant in practice have the same effect when it comes to the production of one's private papers. In either case, defendant is the unwilling source of the evidence, and the Fifth Amendment forbids one being compelled to be a witness against himself. The Court's Fifth Amendment analysis was *never* involved in *Warden* and clearly not altered by the *Warden* decision.

However, the Court in *Warden* did not carefully delineate the distinctive reasoning of the Courts in *Boyd* and *Gouled*. Thus, the question remains unanswered: Did the Court in *Warden* reject only the "evidence-instrumentality" rationale, thus leaving intact the privacy rationale of the *Boyd* Court and the conclusion that private writings are inadmissible, or did the *Warden* Court overrule *sub silentio* the conclusion of inadmissibility in *Boyd* and *Gouled* and thus imply a different application of the privacy standard?

The *Warden* decision has for this reason engendered a myriad of confusion and speculation as to its

meaning. The result is a *Clear Conflict of Decisions Among the Circuits and in the State Supreme Courts* respecting the admissibility of private writings which is irresolvable absent further Supreme Court consideration.

Four Circuits have thus far examined the impact of the *Warden* decision on the inadmissibility of private writings.

Opinions of Circuits and State Supreme Courts upholding the general inadmissibility of private writings include; *Hill* v. *Philpott*, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); *VonderAhe* v. *Howland*, 73-1 U.S.T.C. 9333 (9th Cir. 1973); *Clark* v. *State*, 269 A.2d 59 (Del. 1970); *State* v. *Bisaccia*, 45 N.J. 504, 213 A.2d 185, 190-91 (1965).

These directly contradict decisions holding such private writings admissible. *E.g.*, *United States* v. *Bennett*, 409 F.2d 888 (2d Cir. 1969); *United States* v. *Blank*, 459 F.2d 383 (6th Cir.), *cert. denied*, 409 U.S. 887 (1973). The cases are not distinguishable as to their facts with respect to the Question Presented, and division of authority invariably occurs respecting the impact of the *Warden* decision on *Boyd* and *Gouled*.

Hill v. *Philpott* is a case directly on point with the instant case. The government had seized various books and papers of a Dr. Hill pursuant to a search warrant. In *Hill*, as in the instant case, it was not suggested that the papers were producable and therefore not privileged under the "required records doctrine" enunciated in *Shapiro* v. *United States*, 335 U.S. 1 (1948).

Hill viewed *Warden* as merely eliminating any distinction between "mere evidence" and "instrumen-

talities." Relying upon *Gouled* and *Boyd* in upholding the inadmissibility of Dr. Hill's papers, the Court stated with respect to *Warden*:

> "In overruling *Gouled* as to its Fourth Amendment teachings, we do not believe that the Court intended to in any way diminish the Fifth Amendment characteristics which might attach to certain items of property, such as personal books and records. Indeed, the Fifth Amendment holding of *Gouled* which concluded that the documents there at issue were protected appears still to be applicable, as that aspect of the case was not mentioned in the *Warden* opinion." 445 F.2d at 148.

By *Hill* the Seventh Circuit expressly adopted application of the "testimonial" or "communicative" exception first initiated by the Court in *Schmerber* and *Warden*. In doing so the Court rejected as more shadow than substance the theory of Dean Wigmore which distinguishes between papers obtained by a defendant by search and seizure rather than by force of subpoena.[4] Relying upon *Gouled*, the Court in *Hill* pointed out that in either case a criminal defendant would be the unwilling source of evidence, and thus "compelled" to be a witness against himself in violation of the Fifth Amendment.

Twice recently this Court has cited with apparent approval the authority and rationale of *Hill*.

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[4] The position adopted by *Hill* on the compulsive nature of both subpoenas and search warrants when private writings are involved was similarly adopted in *VonderAhe* v. *Howland*, 73-1 U.S.T.C. 9333 (9th Cir. 1973); WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL, § 665, n.88 (1969); Lipton, *Search Warrants in Tax Fraud Investigations*, 56 A.B.A.J. 941, 943 (1970).

In *Couch* v. *United States,* 409 U.S. 322 (1973), an IRS agent had issued a summons to Couch's outside accountant to produce records which Couch had regularly given him for tax preparation and which remained in the accountant's continuous possession. The Court stated that Couch could not invoke the protection of the Fifth Amendment privilege to prevent production of the records by her accountant because she had no legitimate expectation of privacy in tax records maintained for tax purposes and transferred to her accountant, and no governmental compulsion existed against the person of the accused. With reference to *Hill,* the Court stated:

> "Petitioner's reliance on *Boyd* v. *United States, supra,* is misplaced. In *Boyd,* the person asserting the privilege was in possession of the written statements in question. The Court in *Boyd* did hold that 'any forcible and compulsory extortion of a man's own testimony or his private papers to be used as evidence to convict him of crime,' violated the Fourth and Fifth Amendments. 116 U.S. 630. That case did not, however, address or contemplate the divergence of ownership and possession and petitioner concedes that court decisions applying *Boyd* have largely been in instances where possession and ownership conjoined. See, e.g. *Hill* v. *Philpott,* 445 F.2d 144 (7th Cir. 1971); *United States* v. *Judson,* 63-2 U.S.T.C. 9568 (9th Cir. 1963). * * * But we reiterate that in the instant case there was no enforced communication of any kind from any accused or potential accused.
>
> "Petitioner would, in effect have us read *Boyd* to mark ownership, not possession, as the bounds of the privilege." (409 U.S. at 330-31).

In *Bellis* v. *United States,* 409 U.S. 330 (1974), a member of a small partnership claimed his own Fifth

Amendment privilege against self-incrimination to forestall production of financial records of the partnership in his possession. The Court denied Bellis the privilege because the records were of a "collective entity" and not Bellis personally. The Court stated that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his *"personal papers and effects . . .* [*and*] *compelled oral testimony . . . as well as personal documents containing more intimate information about the individual's private life."* 409 U.S. at 333 (Emphasis added). As authority, the Court relied upon *Boyd* v. *United States, supra; Couch* v. *United States, supra,* and *Hill* v. *Philpott, supra.* By Contrast, *United States* v. *Blank,* 459 F.2d 383 (6th Cir.), *cert. denied,* 409 U.S. 887 (1972), involved and upheld the seizure pursuant to a search warrant of business accounts.

The decisions of the Second and Sixth Circuits, view *Warden* as effectuating a total rejection of both the theory and conclusions of the *Gouled* and *Boyd* decisions. E.g., *United States* v. *Bennett,* 409 F.2d 888, 896 (2d Cir. 1969). They adopt the approach of Dean Wigmore, rejected by this Court in *Gouled.* Those decisions circumscribe the scope of the "privacy" standard and "testimonial" exceptions adopted in *Warden* to preclude relief for one whose private papers are the subject of an otherwise lawful search. E.g., *Bennett,* at 896-897.

The judgment below follows the Sixth and Second Circuit approach, but is inconsistent with that the Seventh, Ninth, and this Court in *Boyd, Gouled, Warden,* and other cases.

The petition should be granted to permit a decision by this Court resolving the conflict.

CONCLUSION

This petition presents an important question on the application of Fourth and Fifth Amendment principles to the attempted use in evidence of private notes, testimonial in nature, taken from the possession of an accused pursuant to the compulsion of a search warrant.

The question is a significant and recurring one. There are conflicts among the circuits and in the state appellate courts. The decision below appears inconsistent with applicable precedent from this Court.

For the foregoing reasons, the Court should grant the writ and set this case down for plenary review.

Respectfully submitted:

ROY LUCAS
Suite 250
Federal Bar Building West
1819 H Street, N. W.
Washington, D. C. 20006

APPENDIX

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,
Respondent,

v.

KENNETH G. LAWRENCE, ELIZABETH REED AND EDWARD REED,
Appellants.

Appeal From Florence County
Clarence E. Singletary, Judge

Opinion No. 19924

Filed December 10, 1974

AFFIRMED

Thomas W. Broadwater, Kenneth Kitts and Jack McGuinn, all of Columbia, for appellant Kenneth G. Lawrence; and Richard G. Dusenbury, of Florence, for appellants Elizabeth Reed, et al.

Attorney General Daniel R. McLeod and Assistant Attorneys General Robert M. Ariail and Richard P. Wilson, all of Columbia, for respondent.

BRAILSFORD, A. J.: The appellants, Kenneth G. Lawrence, Elizabeth Reed and Edward Reed, at the December, 1973, term of the Court of General Sessions for Florence County, were convicted of conspiracy to violate Act No. 445 of 1971 relating to narcotic and other controlled drugs. They have appealed on sixteen exceptions which are argued in the brief under five divisions.

Lawrence is a medical doctor specializing in obstetrics and gynecology. The Reeds are husband and wife. During the times in question, Mrs. Reed was Dr. Lawrence's patient and part-time, unpaid assistant.

Arrest warrants were issued when an inspector of the Narcotics and Drug Control Division of the State Department of Health learned that in a number of instances Mrs.

Reed had obtained relatively large quantities of amphetamine on prescriptions written by Dr. Lawrence, which purported to prescribe the drug for persons who, in fact, were strangers to the transactions, and that Mr. Reed had obtained amphetamine by like means on one occasion.

On September 19, 1973, a warrant was issued authorizing the search of Dr. Lawrence's office for records pertaining to five named persons to whom spurious prescriptions had ostensibly been furnished. On September 21, a warrant was issued authorizing an additional search for a list of persons for whom prescriptions for controlled drugs had been written but who were in fact not Dr. Lawrence's patients. Both warrants were served, limited searches of Dr. Lawrence's office were conducted, and a motley but relatively small collection of records and memoranda relevant to the charge were seized.

These records were allowed in evidence at the trial over the objection of Dr. Lawrence that their seizure and use violated his constitutional privileges against unreasonable searches and seizures and against self-incrimination. The first issue argued in the brief is the claim that the admission into evidence of the products of these searches was error on these grounds.

These records consist largely of four pseudo patient charts reflecting prescriptions of drugs to the persons named, but which were actually obtained by Mrs. Reed, and various lists of names and addresses, sometimes including ages and weights, and a general description of pills desired (*e.g.*, black ones). These lists are apparently in Mrs. Reed's handwriting. On many of them, a specific designation of the drug and dosage prescribed has been added by Dr. Lawrence. Some of these writings are illegible to us, and we quote appellants' description of their nature and effect.

> "The writings seized by the offending search warrant could scarcely have been more incriminating:

(1) They showed repeated trafficking in pill transactions by the Defendants Lawrence and Reed. (2) They showed intermingled handwriting of the Defendants Reed and Lawrence. . . . (3) (T)he written memoranda contained repeated references to prosecuting witnesses, for whom prescriptions were written, but each of whom denied authorizing them or that he or she was a patient of Dr. Lawrence. . . . For example, the names Leonilda Harrell, Mrs. B. F. Anderson, Mrs. Bob Parker and Mr. and Mrs. James Dew. (4) The note from Reed to Lawrence constituting the exhibit on p. 38 of the transcript was devastating. It is fair to say that this evidence was the most incriminating evidence submitted by the State."

The note, referred to in the above quotation, again in Mrs. Reed's handwriting, conveyed the purported request of a Mr. Dew, "who couldn't go set with all the women" (in the doctor's office) that his prescription be put in his wife's name. This is followed by Mrs. Dew's name and address and the word "Black." At the bottom of the note in Dr. Lawrence's handwriting appear "8 June 1973 Biphet 20 100 t t.i.d. (one, three times daily)."

Citing Hill v. Philpott, 445 F. (2d) 144 (7th Cir. 1971), cert. denied 404 U. S. 991 (1971), as being almost directly in point, appellants contend that the seizure and use at the trial of these records violated rights "guaranteed them under the interrelated operation of the Fourth and Fifth Amendments of the United States Constitution"

It is generally held that to compel a defendant, by subpoena or court order, to produce his private records or papers for use as evidence against him violates his privilege against self-incrimination. Boyd v. United States, 116 U. S. 616 (1885). In the case relied upon by appellants, the Court of Appeals for the Seventh Circuit, one judge dissenting, extended this rule to the records of a taxpayer which had been seized by agents of the Internal Revenue

Service under valid search warrant procedures. Hill v. Philpott, *supra.*

A unanimous Court of Appeals for the Sixth Circuit in United States v. Blank, 459 F. (2d) 383 (6th Cir. 1972), cert. denied 409 U. S. 887 (1972), pointing to an important distinction between records sought by subpoena and those procured by search warrant,[1] refused to follow Hill v. Philpott, and held that the use as evidence against an accused of his business records which had been taken from him under a valid search warrant is not compelled self-incrimination. We are persuaded to this view by the reasoning of the Court and by the authorities cited in its opinion. There being no challenge to the validity of the search warrants on this appeal, except the untenable claim that, as private records, the documents in question were exempt from seizure, we find no merit in the appellants' Fourth and Fifth Amendment claims.

The next three questions (2, 3 & 4) are argued together and are all premised on the claim that the drug amphetamine, to which the evidence against appellants related, was not scheduled by the Act as a controlled substance at the times referred to in the indictment and evidence.

Act No. 445 of 1971, the Drug Act, divided covered drugs into Schedules I through V according to their potential for abuse and other criteria. The drug amphetamine was on Schedule III when the Act was adopted in June, 1971, indicating that it possessed less potential for abuse than those on Schedules I and II, but a greater potential than those drugs listed on Schedules IV and V. Soon after-

---

[1] "The subpoena compels the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The search warrant involves no such element of compulsion upon an actual or potential defendant." 459 F. (2d) at 385. For an elaboration of this rationale, see 8 Wigmore, Evidence, Sec. 2264 (McNaughton rev. 1961).

ward, the South Carolina Board of Health, to which limited authority was given to add, delete or reschedule drugs by rule when the General Assembly was not in session, undertook to follow the lead of federal authorities by transferring amphetamine from Schedule III to Schedule II. Notice of this change was filed in the office of the Secretary of State, and the Board recommended to the General Assembly that this transfer be adopted legislatively, which was finally done by Act No. 1068 of 1974.

The appellants were originally indicted in October, 1973, for offenses alleged to relate to a Schedule II drug. When appellants challenged the efficacy of the Board's attempt to place amphetamine on Schedule II, for failure to give required notice and opportunity for hearing to all interested parties and failure to make required findings, the appellants were reindicted for conspiracy to violate the Act with respect to amphetamine, "a controlled substance under Schedule II or Schedule III of the aforesaid Act . . . ."

The appellants then renewed their attack on the indictment and requested an opportunity to present evidence demonstrating the Board's failure to comply with statutory and due process requirements in the rule-making process. The court refused upon the ground that it was immaterial whether amphetamine was on Schedule II or Schedule III at the times named in the indictment, since, in either event, it was a controlled substance.

We agree and find it unnecessary to counter in detail the long and involved argument of counsel. Appellants were indicted and convicted of conspiracy to violate Section 32-1510.51 (a) (3), Code of 1962 (1973 Supplement) (fraudulently obtaining possession of a controlled substance) and (4) (putting false, material information into a document required by the Act). The offense concerns conspiracy to obtain possession of a controlled substance by fraud, without regard to the scheduled classification of

the drug. It was unnecessary for the indictment to designate the schedule on which amphetamine was listed in order to fully apprise appellants of the charge against them; hence, appellants' claim that "due process would require that the State specifically designate the particular schedule being violated" is without merit.

The claim that amphetamine lost its status as a controlled substance by the allegedly ineffectual attempt of the Board to transfer it to Schedule II is likewise insubstantial. Amphetamine was included as a Schedule III controlled substance by the terms of the Act when adopted in 1971. Soon afterward, the Board undertook to reschedule the drug to Schedule II, and the Act was amended to this effect in 1974. If the Board's attempt to reschedule was not soundly based, which we need not decide, the result was simply to leave amphetamine as a Schedule III controlled substance until transferred to Schedule II by the legislature.

Under question 5, the appellants complain of the admission of "irrelevant and prejudicial evidence and testimony" in seven particulars, which they summarize as follows:

> "(1) In allowing the State to introduce irrelevant, incompetent and prejudicial manufacturer's drug instruction inserts, in that such evidence violated Defendant's right under the Sixth Amendment of the United States Constitution to confront and examine witnesses and to have the assistance of counsel; (2) in permitting the State to introduce the detailed Courthouse records of tax liens, judgments and financial insolvency in that such evidence had insignificant probative value and was highly prejudicial; (3) In failing to grant Defendant's motion for mistrial when the State was permitted to imply Defendants were engaging in drug traffic, a highly opprobrious and prejudicial insinuation violative of Defendants' rights to due process and a fair and impartial trial; (4) in permitting the State to offer the testimony of a psychiatrist, Dr. E. W. Camp, in reply, on the advisability of pre-

scribing the drugs in question as weight control measures and the inflammatory testimony of the effects of such drugs in that such opinion testimony was not relevant to the issues in the case, was not properly in reply, and prejudicial to an extreme degree; (5) in permitting the State to introduce the 'black market' value of such drugs in that there was no evidence such were intended for, or were in fact delivered to the 'black market'; (6) in permitting the State to offer the testimony of Dr. Shuler, a pharmacist only *and not a licensed doctor* on a purely medical question of the advisability of the medical prescriptions and an evaluation of the quantities thereof; (7) in permitting the State to offer testimony in reply of a medical doctor (Dr. Jeter) and of other medical doctors (Dr. Morris) in that such testimony was not relevant to the issues in the case and was not properly in reply and prejudicial to an extreme degree."

(1) *Manufacturer's inserts*

(4) *Dr. Camp, testimony in reply*

(7) *Dr. Jeter and Dr. Morris, testimony in reply*

During his direct testimony, Dr. Lawrence discoursed at some length on the nature and effect of amphetamine and its proper use in weight reduction programs such as he supervised. He testified, in effect, that he had prescribed the drug only in the exercise of his medical judgment as to the best interest of his patients, and that the large doses which he prescribed were medically sound. He was then cross-examined on so-called manufacturer's inserts, which are printed matter inserted into quantity packages describing the drug involved and furnishing recommendations as to use and dosage. These were in some respects strikingly different from what Dr. Lawrence had testified was sound medical practice. Dr. Lawrence testified that he was familiar with these inserts, and they were admitted into evidence over counsel's objection.

We think that the inserts were properly admitted. While a physician is not bound by a drug manufacturer's

recommendations, they are certainly material factors for consideration in prescribing its product. Although the soundness of Dr. Lawrence's medical judgment was not at issue, his good faith was of the essence. The jury was entitled to consider these recommendations, and the testimony of other medical experts called by the State in reply, in weighing the credibility of Dr. Lawrence's testimony that he had written the challenged prescriptions in normal course of medical practice, rather than in furtherance of the alleged conspiracy.

In further reply to Dr. Lawrence's testimony that he had only prescribed the drug in good faith in the exercise of his discretion as a medical doctor, the State called three medical experts.

Dr. Camp, a psychiatrist, testified in the most positive terms that amphetamine is a very dangerous drug indicated for use only in treatment of narcolepsy, which is a form of epilepsy. When the witness was asked about the advisability of its use for weight control, counsel objected to "this as not being one of the issues in the case." The objection was overruled, and the witness responded that "there is no indication for them to ever be used in weight reduction." On cross-examination the witness stated again and again in the strongest of terms that, with the exception noted, the prescription of amphetamine was medically unwarranted.

Dr. Jeter testified that he had attended Mrs. Parker, in whose name two of the spurious prescriptions had been written, as her regular physician since 1965. He described certain chronic bodily and emotional conditions suffered by Mrs. Parker which, in his opinion, contraindicated the use of amphetamine, and testified, in effect, that the use of the drug by her would be disastrous. There was no objection to his testimony, and he was cross-examined at length on the opinions which he expressed.

Dr. Morris testified that he himself used amphetamine in weight reduction programs and that he personally knew of four or five other local doctors who did so. He also was aware that some doctors considered the drug too dangerous for such use, but he did not agree. However, he would not approve of a dosage of as many as three per day for weight control, which the challenged Lawrence prescriptions uniformly called for.

The exception to allowance of the testimony of Dr. Camp conforms to the objection made at the trial, *i.e.*, that it "was not relevant to the issues in the case and was prejudicial to an extreme degree." We are inclined to agree that the testimony of this witness should have been excluded as irrelevant. His condemnation of the use of amphetamine as an aid to weight reduction went far beyond the theory of the State's case, which did not challength the propriety of the use of the drug in such programs. However, sandwiched, as it was, between the State's reliance upon the manufacturer's instructions and the other medical testimony offered by the State in reply, all of which clearly recognized the medical value of the discreet use of amphetamine for weight reduction, we see no possibility that this testimony prejudiced appellants' case.

The exception to the testimony of Dr. Jeter and of Dr. Morris is "that such testimony was not properly in reply to new matter and was irrelevant and highly prejudicial." No objection was made at the trial to the testimony of Dr. Jeter. Furthermore, his testimony was clearly in reply to Dr. Lawrence's claim that the prescriptions had been written in the normal course of his practice, and was relevant to the issue of good faith in writing two prescriptions for Mrs. Parker. The testimony of Dr. Morris was also in reply to Dr. Lawrence's testimony concerning proper usage of the drug and was relevant to the issue of good faith.

(2) *Tax liens and judgments*

After Dr. Lawrence testified on direct examination that he had a very lucrative practice from which he received from $180,000.00 to $200,000.00 per annum, it was developed on cross-examination, over objection for irrelevance, that tax liens and judgments on file against him totaled over $250,000.00. We think that the testimony was relevant, at least to rebut any inference from the doctor's claimed affluence that he had no motive for seeking illegal gain.

(3) *Implication that appellants were engaging in drug traffic.*

(5) *Testimony as to black market value of drugs.*

The head of the Narcotics Division of the Florence County Sheriff's Department was asked whether he had had occasion to participate in illegal drug traffic investigations, as a preliminary to questioning him about the black market value of the drugs obtained by the Reeds on prescriptions furnished by Dr. Lawrence. These questions were objected to on the ground that the drugs in question were not illegal drugs and that the appellants were not charged with selling them. The court ruled that testimony as to the value of the drugs when sold without a prescription was relevant to the charge of conspiracy. We agree. The testimony tended to prove that the Reeds obtained some 1600 pills or capsules, each containing 20 milligrams of amphetamine, on spurious prescriptions written by Dr. Lawrence. That these drugs had a black market resale value tended to prove motive for the conspiracy.

(6) *Testimony of pharmacist.*

Dr. Shuler testified that in his experience the prescription of amphetamine to be taken three times per day was most unusual; that the usual dose was one per day taken at about 10:00 A.M. This was clearly within his competence as

an experienced pharmacist. He did go further and explain the reason for giving the dose at 10:00 A.M., relating it to the drug's stimulating effect on the nervous system, resulting in "difficulty in going to sleep if taken later on." If this exceeded the witness' competence, which we do not decide, it did no harm to appellants' cause, because the fact stated was otherwise abundantly clear on the record.

Appellants purport to argue exceptions 8 and 10 under question 6, which we quote from the brief:

> "Did the Trial Court as a matter of law deprive the accused(s) of a fair and impartial trial by substituting recklessness and/or wilfullness in place of specific intent?"

Exception 8 charges that the court erred in permitting testimony "as to recklessness by Dr. Lawrence in issuing certain prescriptions" in that such evidence was irrelevant and prejudicial. The argument of this exception is in general terms and fails to identify the testimony complained of. It broaches no issue not already disposed of under question 5, (1), (4) and (7).

Exception 10, which complains of error in the instructions, is nowhere argued in the brief; hence, it is deemed abandoned.

The remaining exception, No. 12, asserts that the court erred in refusing to instruct the jury that "admissions of culpability made after a conspiracy has ended are only admissible against the defendant conspirator making them in that the State failed to establish a proper foundation for the testimony of Mrs. B. F. Anderson as to admissions of Mrs. Reed made at an undetermined time, admissions incriminated both her and the defendant Lawrence."

The exception is not supported by the record, which shows that the conversation with Mrs. Reed to which Mrs. Anderson testified took place "on Tuesday following August 12th

(1973). So that would have been on the 14th." It was on Sunday, August 12, that the pharmacist Shuler had filled four of the spurious prescriptions, two for Mrs. Reed and, later on the same day, two for Mr. Reed, for a total of 400 20 milligram amphetamine pills. There is nothing in the record to indicate that the conspiracy, which the jury found, terminated prior to the commencement of the investigation by the Narcotics and Drug Control Division on August 16, 1973. No request was made that the court submit to the jury an issue as to whether the statements made by Mrs. Reed were in furtherance of the conspiracy.

Affirmed.

Moss, C. J. Lewis, Bussey and Littlejohn, JJ., concur.

(Caption Omitted in Printing)

Order

Attorneys for appellants have filed Motion for Stay pending a final determination of an appeal to the United States Supreme Court. It is therefore ordered that the remittitur in this case be stayed and the execution of the sentence of the appellants be stayed for a period of ninety (90) days from December 16, 1974. Upon receipt of notice from the Clerk of the United States Supreme Court that an appeal in behalf of the appellants has been docketed in that Court the stay shall continue until the final disposition of the case by the Supreme Court of the United States.

/s/ Joseph R. Moss
For the Court
Joseph R. Moss, *Chief Justice*

Columbia, South Carolina
December 20, 1974.

SUPREME COURT

Appeal from Florence County

. . . The sentence with regard to Kenneth G. Lawrence and Elizabeth Reed is that you each be confined on the public works of Florence County, or in the Department of Corrections for a period of two and a half years, to run concurrently on each of these sixteen counts. I suspend a portion of that and require you to serve one year, and place you each on probation for three years thereafter. So on the conclusion of the service of this one year term you each have a year and a half which you could be sentenced to if you violate the law during the probationary period.

As far as Mr. Reed is concerned, I am going to permit you to pay a fine if you wish to. The sentence is that you be confined on the public works of Florence County, or in the Department of Corrections for a period of two and a half years. I suspend that on condition that you pay a fine of Two Thousand Dollars, or serve one year, and likewise place you on probation for three years thereafter.

MR. DUSENBURY: Your Honor, we would move to have an appeal bond set in this case that is commensurate with the ability of the defendants to pay. I think the State brought out that Dr. Lawrence and others are not independently wealthy, even though they, he, for instance, occupies a professional position. And we would ask the Court, we would move the Court to set an appeal bond that does not further drain their resources. Mr. Reed is confronted with a fine here, and we would ask Your Honor to set a reasonable appeal bond. We don't think there is any indication that the defendants will depart the jurisdiction, or flee, or in any wise seek to evade the bond and they know we are in the process of appealing the decision.

i. 9-19-73 10:20 P.M.
c Caffeine
Parker, Mrs. Bob
106 Wildwood Drive
Aug 19, 1973
Aug 12, 1973 Emplit 20 KO i Tab (5)

C. Caldwell Wife Bailey, Hirsi

NAME AND ADDRESS 120 Scott St. INSURANCE AGENT'S NAME DATE 5-12-73

SEL. NO. | DETECTED BY | OCCUPATION | AGE | SEX | COLOR

Right #100 "20" fit full
Aug 10, 1973 Right 20 lbs Fitted

HISTACOUNT FORM NO. 591

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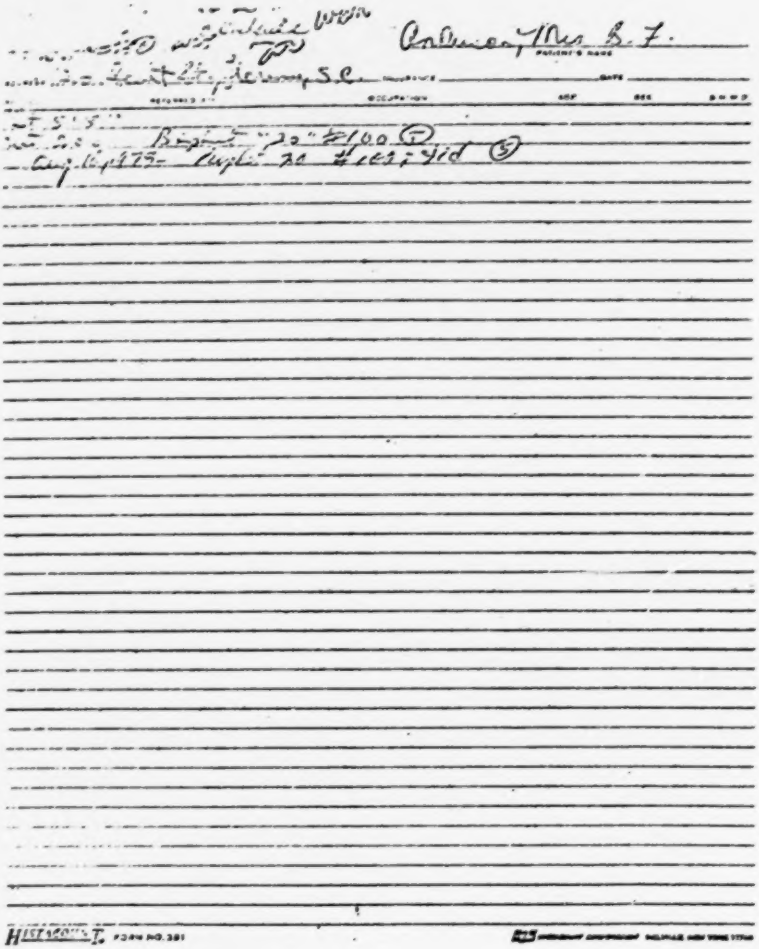


Copies sent WPB 620

Rental, Virginia, S.C.

Right 320
Aug 10, 1943 Right 20 165 7/16

Cathy Mason
1701 Yaupon Dr.
Apt A
Myrtle Beach S.C.

pink on one side
+ white on the
other

only TX worked (8)

Eliz Reed

D-730928093 Q8 P11
FBI
LABORATORY

D-730928093 Q7 PW
LABORATORY

① Matilda Johnson 5'2" 180lb
Route No 1. Hemingway S.C. 47 years Age

② Margaret Willing 5'11" 200lb
Route 1 Effingham City ... age 40

③ Gene Greene 5'1" 165lb
105 S Homestead City age 36

④ Martha Brunson 5'2" 170lb
old Marion Hwy - City age 30

⑤ Linda Watts 4'9" 145
Route No 1 Lamar age 24

⑥ Mrs Joe Spears
Route No 1 Darlington

⑦ Oneg Player 5' 150
Route No 1 Cowards 48 age

⑧ Sam Roberts 5' 8"
Allen Trailer Pk 180 lb
age 19

⑨ Mrs Garris McKenzie (your Patient)
Oakwood Ext.

⑩ Lavinia Pettigrew 5'2" 170
Allen Trailer Park age 18

Mrs. Lee 8 June 1977

Mrs Dorothy Hudson

No more prints on one roll

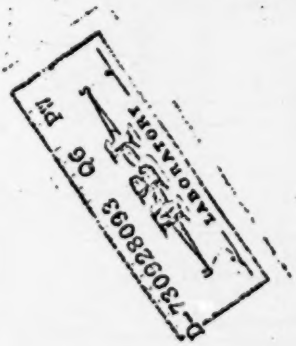
+ white on other

Off Market

Close caps - Seem in place

If this not appropriate

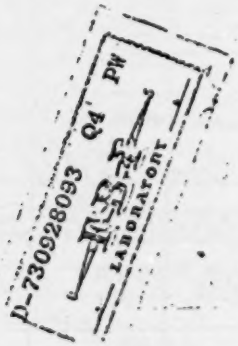
Send back to me

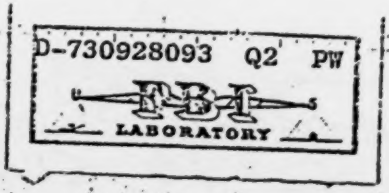


Loretta Ward
120 Scott St.
Clarence L.C. (Block)

Mrs B.T. Anderson
104 Wildwood Dr.
Quinby (Block)

Mrs Bob Parker
106 Wildwood Dr.
Quinby. (green)





Section B (continued)

DATE	PAID TO	W FOR	AMOUNT
	TOTAL BROUGHT FORWARD		
	Mrs. Mary L. Jones		
	124 Dogwood Trl		
	FLORENCE, S.C.		
	Ac. 34 54" W 14		
	left 48		
	Mrs Eaileen Simmons		
	P.O. Box 180		
	Timmonsville, S.C.		
	Ac. 48 54" W 52		
	left 48		
	TOTAL CARRIED FORWARD		

3

Dr Lawrence me Dew
said he couldn't go
set with all the
women but you could
Put his in his Wife
~~wife~~ name? Last 10
mere lb. I take a diet
Pill & Can't Lose
What could be wrong
with me?

O mrs James Dew
Route no1 (Block)
Effingham

8 June 1973 Right to his file (5)
Bill Cockrell Board

Dorothy Mae Duke age 1
Dec-12-1928

1567 N. Willis St.
Florence, S.C.

① Pedal "20" # 100
+ H.d.

② Pedal #50 B. P.
+ Delay 120/80

Wt- 226 lbs
Ht- 5 foot 2.

Water Pills too

July 11-1973.

PASC 914

DISBURSEMENTS

Block C Bertha Mason
1701 Yancey Dr.
apt A Little Rock 5 S.

Block C Janetta Ward
Route 10, Florence

DATE	Ck. Num. Acct. No.	Check Number

Cr. Code	CREDIT AMOUNT BANK	PAYEE	Dr. Code	L O C	DEBIT Cons. No.	DEBIT Acct. No.	DEBIT AMOUNT
	Block A	Alma Faye Floyd				✓	
	Block 24	Route 10					
	11 to 20	Effingham S.C.					
	Block B	James Dixon				✓	
		Route no 1 Effingham					
	Block D	Nancy Johnson				✓	
		7 A Anderson apt					
		Florence					
	Block W	Linda Gale Williams				✓	
		305 Railroad Ave. Florence					
	Block B	Neilda Harrold				✓	
		113 Rosemary Ave Flo.					
	Block D	Elizabeth Pratt					
		13 th Virginia Ct Cir		Flo		✓	
	Block D	Mamie Floyd		Flo		✓	
		Sandra Drive					
	Block C	Bessie Finley		Flo		✓	

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Constitutional Provisions and Statutes Involved	2
Statement	2
Argument	4
Conclusion	10

CITATIONS

Constitutional Provisions: PAGE

United States Constitution

Amendment IV ..... Passim

Amendment V ..... Passim

Statutes:

Section 32-1510.51, 1962 Code of Laws of South Carolina, as amended 2

Cases:

Boyd v. United States, 116 U. S. 616 (1885) 5

Couch v. United States, 409 U. S. 322 (1973) 5, 9

Gouled v. United States, 255 U. S. 298 (1921) 6

Hill v. Philpott, 445 F. (2d) 144 (7th Cir.), cert. denied, 404 U. S. 991 (1971) 6

Johnson v. United States, 333 U. S. 10 (1947) 7

Malloy v. Hogan, 378 U. S. 1 (1964) 5

Schmerber v. California, 384 U. S. 757 (1966) 7

State v. Bisaccia, 45 N. J. 504, 213 A. (2d) 185 (1965) .. 6

State v. Griffin, 129 S. C. 200, 124 S. E. 81 (1924) 8

United States v. Bennett, 409 F. (2d) 888 (2nd Cir. 1969) 8

United States v. Blank, 459 F. (2d) 383 (6th Cir.), cert. denied, 409 U. S. 887 (1972) 8

Warden v. Hayden, 387 U. S. 294 (1967) 6, 7

Other Authorities:

8 Wigmore, Evidence, § 2264 (McNaughton rev. 1961) 8

16A Moore's Federal Practice, Key No. 393(1), 393(2) 8

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1144

KENNETH G. LAWRENCE, M.D., ELIZABETH REED, AND EDWARD REED, PETITIONERS,

versus

STATE OF SOUTH CAROLINA, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of South Carolina is reported at 212 S. E. (2d) 52 (1974) and is set out in Appendix of Petition.

JURISDICTION

Respondent does not question the Court's jurisdiction in the proceeding.

QUESTION PRESENTED

Did the Trial Court and Supreme Court of South Carolina violate Petitioners' rights under the Fourth and Fifth Amendments to the United States Constitution by ruling that certain documentary evidence seized under a valid search warrant were admissible into evidence at Petitioners' trial?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent statutes and constitutional provisions are set out in Petition.

STATEMENT

Petitioners were arrested in September, 1973, and were indicted at the October, 1973, term of the Court of General Sessions for Florence County, South Carolina, on charges of conspiring to furnish false or fraudulent information in the writing of medical prescriptions in order to gain the possession of a controlled substance, namely amphetamine, by their misrepresentation, fraud, forgery, deception, and subterfuge, all being in violation of Section 32-1510.51 of the 1962 Code of Laws of South Carolina, as amended.

The conspiracy first surfaced on Sunday, August 12, 1973, when Petitioners Elizabeth and Edward Reed at separate times during the day presented five medical prescriptions for filling to Dr. Richard D. Shuler, a pharmacist at Revco in Florence, South Carolina. Dr. Shuler testified at the trial that his suspicions were aroused by the unusually large dosage, number, and quantity (100 capsules, 20 mg., one three times a day) of the prescriptions presented to him. (T.R. p. 68, f. 272; p. 72, f. 287.)[1] His subsequent telephone calls to the two individuals named on the prescriptions presented first by Mrs. Reed confirmed his suspicions (T.R. p. 73, f. 290), and he contacted the appropriate narcotics officials (T.R. p. 74, f. 294), who initiated the investigation which ultimately produced the sixteen count indictment against the Petitioners. Arrest warrants were subsequently issued and served on the Petitioners in September, 1973.

Dr. Lawrence's office was searched at the time of his arrest on September 19, 1973, under authority of a valid

[1] References are to the printed "Transcript of Record".

search warrant for certain files, records, and other papers pertaining to the individuals for whom the Reeds had filled prescriptions on August 12, 1973. (T.R. p. 20.) In reliance upon information as to the existence and location of items further evidencing the conspiracy, which information was received from the former bookkeeper of Dr. Lawrence who had terminated her employment following the disclosure of the conspiracy on September 19, law enforcement officers obtained another search warrant, which was uncontestedly valid, and returned to Dr. Lawrence's office on September 21, 1973, and in a very limited search seized the lists which are the subject of Petitioners' present claim. (T.R. p. 27.)

Parenthetically, it should be observed that the pseudo patient charts contained in Appendix pp. 14(a)-17(a) are mistakenly denominated by both Petitioners and the Supreme Court of South Carolina as having been seized under the authority of the September 21, 1973, search warrant. Those charts, however, were seized under the September 19, 1973, search warrant which was not challenged on appeal. (See T.R. pp. 21-25; pp. 28-40.)

After lengthy pre-trial hearings on their motions to suppress the evidence, which were denied, Petitioners were brought to trial and found guilty by a jury on all counts of the indictment. Petitioners' motions for a Judgment N. O. V. and for a New Trial were also denied. The Petitioners Dr. Lawrence and Elizabeth Reed were sentenced to serve a prison term of one year with three years probation. Petitioner Edward Reed was sentenced to serve a prison term of one year or pay a fine of $2,000.00, and was placed on probation for three years. All Petitioners served timely Notice of Intention to Appeal to the Supreme Court of the State of South Carolina on December 12, 1973.

On appeal error was assigned in this regard only to the Trial Court's denial of Petitioners' motions to sup-

press the evidence seized under authority of the September 21, 1973, search warrant. Their exceptions were based upon the assertion that the specific items seized under that warrant were immune from search and seizure under the interrelated operation of the Fourth and Fifth Amendments to the United States Constitution. The propriety and sufficiency of the search warrants have at no time on appeal been challenged by Petitioners.

ARGUMENT

The Petition for Writ of Certiorari which Petitioners seek is advanced upon a purported conflict among the circuits and state appellate courts regarding the admissibility of documentary evidence taken from an accused's possession under authority of a valid search warrant. Respondent, however, believes that the seizure of evidence of the nature here involved does not fall within the intended scope of the protection of the Fifth Amendment privilege. Moreover, Respondent believes that to accept Petitioners' reasoning would be to expand the coverage of the Fifth Amendment to all papers and evidentiary items which happen to be in the possession of an accused regardless of their nature.

In this case, certain papers were taken from Petitioner Lawrence's office under authority of an admittedly valid search warrant. The papers consisted of lists of "patients" and notes, many on scraps of paper, written by Petitioner Elizabeth Reed, a part-time employee and co-conspirator. Dr. Lawrence in turn made occasional notes thereon indicating dosages and directing other office personnel, not involved in the conspiracy, to record the transactions. However, the "patients" named in Mrs. Reed's lists and for whom Dr. Lawrence issued prescriptions were, in fact, strangers to the transactions, as evidenced by their testimony and the actual prescriptions filed with the pharmacy.

Respondent contends that under the circumstances there was no reasonable expectation of privacy in the lists such as would protect them from lawful search and seizure by the State. *Couch v. United States,* 409 U. S. 322 (1973). As noted, the lists were written by Elizabeth Reed and transmitted to Dr. Lawrence, often through other office personnel. No private communications were involved as evidenced by the fact that Dr. Lawrence directed his office personnel to make other business records of the transactions. Respondent further observes that it was one of Dr. Lawrence's former employees who independently called the existence of the documents to the attention of the authorities. Therefore, Respondent submits that no reasonable expectation of privacy in fact existed in the items which were taken from Dr. Lawrence's possession in that other individuals, in the course of their regular business but who were not involved in the conduct of the conspiracy, had both knowledge of and access to the particular documents seized. Petitioners' claim of privilege, it is respectfully submitted, must therefore be based upon Dr. Lawrence's mere possession of the subject papers. Respondent further submits that the weight of authority and our established notions of the Fifth Amendment privilege do not support Petitioners' position.

It has been said that to compel a Defendant, by subpoena or court order, to produce his private records or papers for use as evidence against him violates his privilege against self-incrimination. *Boyd v. United States,* 116 U. S. 616 (1885). The privilege was subsequently applied to the States in *Malloy v. Hogan,* 378 U. S. 1 (1964). In the principal case relied upon by Petitioners, the Court of Appeals for the Seventh Circuit, one judge dissenting, extended the rule to the records of a taxpayer which had been seized by IRS agents under authority of a valid

search warrant. *Hill v. Philpott,* 445 F. (2d) 144 (7th Cir.), *cert. denied,* 404 U. S. 991 (1971).

Hill involved a search of a doctor's office and home by IRS agents under a very broadly worded search warrant. The "truckload" of books, records, and papers seized were used to gain his conviction for willfully attempted tax evasion, and was the only evidence introduced by the government. The case, Respondent agrees, fairly demanded reversal. However, by their holding the two judges in *Hill,* who are admittedly zealous in tax cases, have apparently attempted to foreclose the lawful seizure of incriminating evidence which a Defendant may happen to have in his possession by discarding the accepted logical distinction between obtaining papers from a Defendant by search and seizure rather than by force of process as "more shadow than substance." *Id.* at 149. They cite in support of that position *Gouled v. United States,* 255 U. S. 298 (1921). However, *Gouled* involved, *inter alia,* a situation where personal papers were taken surreptitiously from the Defendant's office by a government agent and with which he was first confronted at trial. The fruit of the *illegal* search and seizure was ruled inadmissible at trial on both Fourth and Fifth Amendment grounds. *Id.* at 306. The undisputed facts in this case, however, are that the search was lawful in all pertinent respects. The pivotal facts of *Gouled* being distinguishable from the case at hand, as well as the questionable vitality of the case after *Warden v. Hayden,* 387 U. S. 294 (1967), it appears to Respondent that *Gouled* offers little support for the Seventh Circuit's reasoning in *Hill,* and no support whatsoever for these Petitioners' position.

The general understanding of the relationship of the Fourth and Fifth Amendments, as ably expressed in *State v. Bisaccia,* 45 N. J. 504, 213 A. (2d) 185, 187 (1965), is that "[w]hereas the Fifth Amendment forbids the use of any

force whatever to compel a person to testify or to produce evidence of his wrong, the Fourth permits the use of all the strength of government to [reasonably] extract from a man's possession things which will convict him."

In *Warden v. Hayden,* this Court accordingly rejected the common law distinction between "mere evidence" and instrumentalities in favor of making the protection of privacy rather than property rights the principal object of the Fourth Amendment. *Id* .at 304. Recognizing the reality that the government has a countervailing interest in solving crime, this Court reaffirmed in *Warden* the basic proposition of *Schmerber v. California,* 384 U. S. 757 (1966), that "it is reasonable, within the terms of the Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals," provided that there be a nexus between the item to be seized and criminal behavior. *Id.* at 306-307. Citing *Johnson v. United States,* 333 U. S. 10, 14 (1947), the *Warden* Court went on to explain that though the demise of the "mere evidence" limitation on lawful search and seizure may enlarge the area of permissible searches, the intrusions may be made only after compliance with the probable cause and particularity requirements of the Fourth Amendment and after the intervention of a "neutral and detached magistrate." 387 U. S. at 309-310.

As noted above, the Petitioners have not challenged on appeal the State's compliance with the Fourth Amendment, but have instead asserted that the documents in Dr. Lawrence's possession were exempt from lawful search and seizure as being violative of their Fifth Amendment privilege against compulsory self-incrimination. This Court in *Warden* expressly declined to decide whether there are items of evidential value whose very nature precludes their being the object of lawful search and seizure. *Id.* at

303. Nevertheless, the Petitioners in this case assume the existence of such a class of items when there is none accepted in law. Consequently, their position, Respondent submits, rests on unfirm ground.

Furthermore, in *Schmerber* it was held "that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, . . ." 384 U. S. at 761.[2] Clearly, some testimonial compulsion must be upon the accused himself to produce the allegedly self-incriminating evidence.

What is a "testimonial compulsion" within the meaning of the privilege, of course, has been the subject of much discussion in the courts and academic circles. The most widely accepted view among the courts and commentators, however, is that of Dean Wigmore as enunciated in his classic work on evidence. 8 *Wigmore, Evidence,* § 2264 (McNaughton rev. 1961). That well-known treatise reasons that the Fifth Amendment privilege does not encompass the seizure and use of evidence where "the proof of [its] identity, or authenticity, or other circumstances affecting them, may and must be made by the testimony of other persons, without any employment of the accused's oath, or testimonial responsibility." *Id.* The generally accepted distinction is that a search warrant does not require the personal affirmation by the accused which is prohibited by the privilege against self-incrimination elucidated by Wigmore. *State v. Griffin,* 129 S. C. 200, 124 S. E. 81 (1924); *United States v. Blank,* 459 F. (2d) 383 (6th Cir.), *cert. denied,* 409 U. S. 887 (1972); *United States v. Bennett,* 409 F. (2d) 888 (2nd Cir. 1969); and generally cases collected 16A Moore's Federal Practice Key No. 393(1), 393(2). While

[2] See 384 U. S. at 761, fn. 5, where the meaning of "testimonial" and "communicative" in Fifth Amendment terms is restricted to "acts on the part of the persons to whom the privilege applies."

expressly refraining from wholly adopting Wigmore's view that the privilege is limited solely to testimonial disclosures "from his lips," the Court in *Schmerber* held, in apparent accord with Wigmore's rationale, that the taking of a blood sample was a "compulsion" but not a "testimonial compulsion" within the scope of the privilege. 384 U. S. at 757-758.

It is respectfully submitted that the removal of papers from an accused's office is no more of a testimonial compulsion than the removal of blood from one's body. After all, it was only after analysis in a laboratory and with the testimony of others that the seizure of blood produced evidence of criminality. *Id.* at 761. Similarly, it was only after analysis in the F.B.I.'s handwriting laboratory and with the testimony of many others that the seizure of the documents here in question evidenced any criminality.

The South Carolina Supreme Court's understanding of the Fifth Amendment privilege, in its interrelated operation with the Fourth Amendment, is in accord with the established notions of the privilege as discussed above. Therefore, it is certain that under the law in South Carolina and in the United States as it relates to the privilege against compelled self-incrimination the Petitioners' claim is untenable and without merit; therefore, it cannot be said that the courts of South Carolina have infringed upon Petions' Fifth Amendment rights.

Finally, Respondent would respectfully direct the Court's attention to the fact that the Petitioners Reed also assert their Fifth Amendment rights against the seizure of the documents in question despite the fact that they were not taken from their possession and, therefore, could not have been obtained through any prohibited governmental compulsion against them. *Couch v. United States, supra.* Nor did they make any showing at any time in the proceedings as to an invasion of their right to privacy in this re-

gard. Therefore, Respondent submits at this time that Petitioners Reed have no standing to object to the seizure and use at their trial of the subject items since no "compulsion" whatsoever was employed by the State against them in violation of their Fifth Amendment rights.

CONCLUSION

The Petition urges in very sophisticated argument that the seizure and admission into evidence at trial of the documents in question served to violate the Petitioners' rights under the Fourth and Fifth Amendments. As demonstrated in reply, however, it is clear on the applicable law and facts of this case that the papers seized were neither "private writings" nor "compelled testimony" within the meaning of the asserted privilege. Consequently, Respondent submits that the Supreme Court of South Carolina was entirely correct in finding no merit in Petitioners' Fourth and Fifth Amendment claims.

Therefore, for all of the foregoing reasons, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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